

Traeger Machetanz, Esq.
Thomas R. Krider, Esq.
OLES MORRISON RINKER & BAKER LLP
745 West Fourth Avenue, Suite 502
Anchorage, Alaska 99501
Phone: 907-258-0106
Fax: 907-258-5519

Attorneys for Nugget Construction Co.
Inc. and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the use of
NORTH STAR TERMINAL & STEVEDORE
COMPANY, d/b/a NORTHERN STEVEDORING
& HANDLING, and NORTH STAR TERMINAL &
STEVEDORING COMPANY, d/b/a Northern
Stevedoring & Handling, on its own behalf,

Plaintiff,

and

UNITED STATE OF AMERICA for the use of
SHORESIDE PETROLEUM INC., d/b/a Marathon
Fuel Service, and SHORESIDE PETROLEUM
INC., d/b/a Marathon Fuel Service, on its own
behalf,

Intervening Plaintiffs,

and

METCO, INC.,

Intervening Plaintiff,

vs.

NUGGET CONSTRUCTION INC.; SPENCER
ROCK PRODUCTS INC.; UNITED STATES
FIDELITY AND GUARANTY COMPANY; and
ROBERT A. LAPORE,

Defendants.

No. 3:98-cv-00009-TMB

REPLY TO NUGGET'S
MOTION IN LIMINE
RESPECTING LETTER FROM
CORPS OF ENGINEERS
ADMINISTRATIVE
CONTRACTING OFFICER
THOMAS A. JOHNSON, P.E.
AND RELATED TESTIMONY

I. INTRODUCTION

Nugget's Motion in Limine seeks to preclude Plaintiff from introducing into evidence the opinions of the Army Corps of Engineers' Contracting Officer, as set forth in his August 26, 1997 letter to Nugget,¹ relating to the relationship between Nugget and Spencer Rock Products. Because the Contracting Officer's opinions are not based on personal knowledge, are derived from only partial information, and are conclusory regarding the ultimate fact of this case, they should be precluded from evidence in this matter.

II. ARGUMENT

To the best of Nugget's knowledge, the Contracting Officer, Mr. Thomas Johnson, never visited the Spencer Rock Quarry or Seward during the Homer Spit project. As such, he never observed the operation of the quarry and the interaction between Nugget and Spencer Rock Products at Seward where Nugget's barge was loaded. As far as can be determined, Mr. Johnson was not privy to Spencer Rock's financial dealings with its bank and Spencer Rock Products' lines of credit and cash flow situation. Mr. Johnson was not aware of who Spencer Rock Products hired and/or fired at its discretion. Neither the Corps of Engineers nor Mr. Johnson had knowledge of Mr. LaPore's personal involvement at the quarry and in Seward relating to Spencer Rock Products' performance of its Material Contract. Finally, Mr. Johnson had no first hand knowledge of Nugget's support of Spencer Rock Products at Mr. LaPore's request. Thus, because Mr. Johnson lacks the requisite personal knowledge to support his

¹ The letter at issue in this motion has been designated by North Star as Plaintiff's Exhibit No. 38.

1 opinion that Nugget had taken over operation of the Spencer Quarry he should not be
2 allowed to testify with regard to this matter at trial.

3 **A. North Star's Cases Do Not Support Its Argument On Waiver**

4 In its Opposition, North Star argues that Nugget waived its right to object to the
5 subject letter, based on Nugget having not objected to the exhibit when it was proffered
6 in support of a summary judgment motion filed several years ago. However, all of the
7 cases cited by North Star involve the preservation of an objection on appeal, and not
8 whether the objection is waived for purposes of a trial subsequent to a denied motion for
9 summary judgment. This rule regarding the preservation of an objection to evidence is
10 reasonable at the appellate level, as it insures that the trial court has had an opportunity
11 to correct a possible error during the course of a trial, rather than allowing parties to
12 sandbag issues to be heard the first time on appeal. These justifications are not
13 present in the current circumstance, as the summary judgment was overturned on
14 appeal and the trial has not yet occurred. There is no concern over judicial economy or
15 possible sandbagging in this case.

16 **B. Mr. Johnson Lacks The Requisite Foundation To Offer The Opinions
17 Set Forth In His Letter**

18 The primary issue in this case involves the relationship between Nugget and
19 Spencer Rock Products regarding Nugget's support of Spencer Rock Products' supply
20 of rock. Mr. Johnson has no personal knowledge relating to anything encompassing
21 that relationship. Instead, Mr. Johnson was provided a few documents upon which he
22 based the opinions stated in his August 26, 1997 letter. Those documents alone,
23 absent additional first-hand information, do not establish the necessary foundation for
24 Mr. Johnson's opinions.

1 The first test for lay opinion testimony under FRE 701 is whether the opinion is
2 “rationally based on the perception of the witness.” This requirement is “no more than a
3 restatement of the traditional requirement that most witness testimony be based on first-
4 hand knowledge or observation.” *Cuyahoga Metropolitan Housing Authority v. United*
5 *States*, 60 Fed.Cl. 481, 482 (2004)(citing WEINSTEIN’S FEDERAL EVIDENCE §701.03[1]).

6 North Star’s attempts to distinguish *DIJO, Inc. v. Hilton Hotels Corp.*, 351 F.3d
7 679 (5th Cir. 2003) are unpersuasive. Although Mr. Johnson may have some first-hand
8 contemporaneous knowledge of the parties during the course of the project, he
9 nonetheless has no personal knowledge of the events and interactions surrounding the
10 quarrying or delivery of rock for this project. This is precisely the failing of the expert in
11 the *DIJO* case – he “simply did not have the requisite first-hand, personal knowledge
12 about DIJO and the Project necessary to qualify as a Rule 701 opinion witness.” *Id.* at
13 686.

14 North Star’s argument that Mr. Johnson’s experience as a Contracting Officer
15 qualifies him to render opinions in this matter is equally unpersuasive. As a preliminary
16 matter, North Star never designated Mr. Johnson as an expert, so he cannot offer
17 opinions based on other than his personal knowledge. Further, the fundamental
18 question for the jury is Nugget’s involvement in the quarrying and delivery operations of
19 Spencer Rock Products. This is an issue involving the interactions of the parties, i.e.
20 Nugget and Spencer Rock Products, relating to the supply of rock. Mr. Johnson does
21 not profess to have particular experience in the quarrying or delivery of rock. In fact,
22 North Star makes no attempt to establish Mr. Johnson’s credentials regarding his
23 experience with rock quarrying or delivery, nor does North Star attempt to establish that
24
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1 Mr. Johnson has any experience in the relationships between a general contractor and
2 its material suppliers to be able to opine as to when the control of one has been taken
3 over by the other. Mr. Johnson may have extensive experience in the realm of federal
4 government contracting; however, the questions at issue in this case do not involve
5 Nugget's contract with the Corps of Engineers. In fact the one opinion rendered by Mr.
6 Johnson on that score – that Spencer Rock Products was not a vendor – was
7 subsequently refuted by the Ninth Circuit. Bottom line, Mr. Johnson's experience as a
8 Contracting Officer does not make him sufficiently expert at rock quarrying to render an
9 opinion as to whether Nugget's support of Spencer Rock Products constitutes a "taking
10 over" of Spencer Rock Products' operations.

11 **C. Mr. Johnson's Letter Can Only Be Offered To Prove The Truth Of The**
12 **Matters Asserted Therein, And Therefore, Is Hearsay**

13 Mr. Johnson's August 26, 1997 letter asserts that Nugget has assumed full
14 responsibility for the operation of Spencer Rock Products. As this issue is the only one
15 relevant in the upcoming trial, there can be no other purpose for admitting the letter than
16 to attempt to prove the matter asserted therein. North Star argues that the letter could
17 be used for some other purpose, such as establishing the Contracting Officer's state of
18 mind relating to the Corps of Engineers' interactions with Nugget. However, North Star
19 fails to explain how the Corps of Engineers' treatment of Nugget is in any way relevant
20 to the present case. The Corps of Engineers view on the relationship between Nugget
21 and Spencer Rock Product does not make any fact relating to the actual relationship
22 any more or less true. The Corps of Engineers' investigation of the relationship between
23 Nugget and Spencer Rock Products does not make any fact relating to the actual
24 relationship any more or less true. The interaction between Nugget and Spencer Rock
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1 Product can only be adduced by how they dealt with each other and/or by how they
2 portrayed their relationship to third-parties. What those third-parties represented to
3 Nugget and/or Spencer Rock Products does not alter or affect the proof of the Nugget –
4 Spencer Rock Product relationship.

5 Therefore, a Corps of Engineers out of court statement expressing its opinions
6 regarding the relationship between Nugget and Spencer Rock Products is irrelevant at
7 best, and certainly is hearsay, as its only relevant purpose would be to prove the truth of
8 the matters asserted therein.

9 Finally, North Star argues that the letter, even if deemed to contain hearsay, can
10 be admitted under the business or public records exceptions. There are several
11 reasons why these exceptions are inapplicable. It would seem highly unlikely that the
12 Corps of Engineers makes it a regular part of its business to send ill-founded opinions
13 regarding its contracting partner's relationship with one of its suppliers; rather, this letter
14 arises under the specter of looming litigation. *Timberlake Construction v. U.S. Fidelity*
15 *and Guaranty Co.*, 71 F.3d 335, 342 (10th Cir. 1995) (documents produced with possible
16 litigation motives not susceptible to business records exception). Moreover, there is
17 little to commend the letter's indicia of reliability, given Mr. Johnson utter lack of
18 personal knowledge regarding the events described in the letter. Thus, the letter does
19 not fall within the business or public records exceptions of FRE 803 (6) or (8), and, even
20 if it did, the opinions contained therein remain precluded by FRE 701.

22 **III. CONCLUSION**

23 Based on the foregoing, the court should grant Nugget's Motion in Limine and
24 preclude North Star from introducing into evidence the Corps of Engineers letter dated
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1 August 26, 1997 and/or any of the statements or opinions offered therein or similar
2 thereto.

3 Dated: July 11, 2007

4 OLES MORRISON RINKER & BAKER LLP
Attorneys for Nugget Construction Inc. and
United States Fidelity and Guaranty Co

5 By: /s/ Thomas R. Krider

6 Traeger Machetanz

7 machetanz@oles.com

8 Alaska Bar No. 8411127

9 Thomas R. Krider

10 krider@oles.com

11 Washington Bar No. 29490

12 745 West 4th Ave., Suite 502

13 Anchorage, AK 99501

14 Phone: (907) 258-0106

15 Fax: (907) 258-5519

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17
18
19
20
21
22
23
24
25
OLES MORRISON RINKER & BAKER LLP
745 West Fourth Avenue, Suite 502
Anchorage, Alaska 99501-2136
Tel: (907) 258-0106 Fax: (907) 258-5519

U.S. ex rel. North Star et al. v. Nugget Construction et al.

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REPLY TO Nugget's Motion in Limine Respecting Letter From

Corps of Engineers Administrative Contracting Officer

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2007, a true and correct copy of the foregoing was served electronically on:

David W. Pease
dwp@bpk.com
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Steven J. Shamburek, Esq.
shamburek@gci.net
Law Office of Steven J. Shamburek
425 G Street, Suite 630
Anchorage, AK 99501-5872

Herbert A. Viergutz, Esq.
barmar@gci.net
Barokas Martin & Tomlinson
1029 West Third, Suite 280
Anchorage, AK 99501

Served by mail on:

Robert LaPore
P.O. Box 640030
Beverly Hills FL 34464

OLES MORRISON RINKER & BAKER LLP

By: /s/ Thomas R. Krider

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Anchorage, Alaska 99501-2136
Tel: (907) 258-0106 Fax: (907) 258-5519

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